

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In the Matter of:)	
)	License Nos. IW023 and XWO13
ENERGYSOLUTIONS)	Docket No. 11005711 (import)
(Radioactive waste import/export)	and No. 11005710 (export)
licenses for Italian waste))	
)	June 10, 2008

**STATE OF UTAH'S REQUEST FOR A HEARING
AND PETITION FOR LEAVE TO INTERVENE**

The State of Utah, by and through its legal counsel, hereby requests a hearing and petitions for leave to intervene on a specific license application filed September 14, 2007, by EnergySolutions. The applicant makes a generic request to allow the import of radioactive contaminated material from nuclear facility operations in Italy. The applicant also requests a license to export back to Italian generators, the imported radioactive material that does not meet the acceptance criteria for the EnergySolutions' disposal facility at Clive, Utah. 73 Fed. Reg. 7,764-66 (Feb. 11, 2008). As described below, the State has an interest that may be affected by the Commission's actions; the State's timely intervention is in the public interest; the State's participation will assist the Commission in making its licensing determination; and the relief the State requests – denial of EnergySolutions' import/export license application – is within the Commission's authority to grant.

I. Background

There are only three low level radioactive waste disposal facilities in the United States. All three have disposal access limitations. After June 30, 2008, the Atlantic Interstate Compact facility at Barnwell, South Carolina, will accept Class A, Class B or Class C low level waste from only South Carolina, Connecticut, and New Jersey. The Northwest Interstate Compact facility at Hanford,

Washington, accepts Class A, Class B or Class C low level waste from the states that comprise the Northwest and the Rocky Mountain Interstate Compacts. EnergySolutions' facility at Clive, Utah, licensed by the State of Utah and subject to Resolutions passed by the Northwest Interstate Compact, accepts Class A low level waste for disposal. The Northwest Interstate Compact recently adopted a clarifying resolution relating to the Clive facility,

reaffirming its position that **the Third Amended Resolution and Order** serves specifically as an arrangement for low-level radioactive waste from unaffiliated states and compacts . . . [and] **does not serve as an arrangement for foreign low-level radioactive waste, nor has the committee ever discussed such an arrangement for foreign low-level radioactive waste.**¹

EnergySolutions has filed a federal lawsuit attempting to liberate itself from any control by the Northwest Interstate Compact.

EnergySolutions has requested a generic license from the Nuclear Regulatory Commission (NRC) to allow it to import up to 20,000 tons (80,000 cubic feet) of radioactive contaminated material. EnergySolutions' stated purpose for the application is,

to import contaminated materials for disposal at our Utah facility. Intermediate uses include inspections, surveys, sorting and stabilization (as required) at our licensed Tennessee facilities. The purpose of the export license is to allow Italian waste that cannot be disposed in Utah to be exported back to Italy.²

Further, EnergySolutions says,

The sources of this material are not fully known as of the date of this application but will be limited to Italian facilities authorized to use and process radioactive material such as reactors, fuel cycle facilities, research facilities, and materials licensees or facilities equivalent to US [sic] Superfund sites.³

¹See Letter from Mike Garner, Executive Director, Northwest Interstate Compact to Stephen Dembek, NRC, May 15, 2008 (*emphasis added*)(ADAMS Accession No. ML081480331).

²EnergySolutions license application cover letter from Ty Rogers to Scott Moore, Office of International Program, NRC, Sept. 14, 2007, at 1 (ADAMS Accession No. ML072950080).

³Id.

Utah's Governor submitted comments from the Utah Radiation Control Board to the NRC, as did the Northwest Interstate Compact, of which Utah is a member. NRC's comment and hearing request deadline is June 10, 2008. 73 Fed. Reg. 12,781 (March 10, 2008).

II. Legal Standard

A request for a hearing or intervention petition must meet the relevant provisions of 10 C.F.R. §§ 110.82 and 110.84. The petition must be timely and list the issues sought to be raised. 10 C.F.R. § 110.82(b)(2) and (c). The Commission has discretion to grant a hearing when a petitioner does not assert or establish an interest which may be affected if (1) "a hearing would be in the public interest" and (2) "would assist the Commission in making the statutory determinations required by the Atomic Energy Act." Id. § 110.84(a). The Commission will consider granting a hearing or intervention when a petitioner has asserted an interest which may be affected by considering the nature of the alleged interest and how it relates to license issuance or denial; and "the possible effect of any order on that interest, including whether the relief request is within the Commission's authority, and, if so, whether granting relief would redress the alleged injury." 10 C.F.R. §§ 110.82(b)(4) and 110.84(b).

In making its licensing determination, the Commission will consider the following criteria:

- (a) The proposed import is not inimical to the common defense and security.
- (b) The proposed import does not constitute an unreasonable risk to the public health and safety.
- (c) Any applicable requirements of subpart A of part 51 of this chapter [NEPA] are satisfied.
- (d) With respect to the import of radioactive waste, an appropriate facility has agreed to accept the waste for management or disposal.

10 C.F.R. § 110.43.

III. Discussion

A. Timeliness

Utah is filing its petition by June 10, 2008, the deadline the Commission established for filing such petitions. 73 Fed. Reg. 12,781. The petition is, therefore, timely.

B. Issues Sought to be Raised

The State of Utah⁴ seeks to raise the following three issues, which are critical to NRC's determination of license issuance or denial. First, whether importing waste from Italy constitutes an unreasonable risk to public health and safety. Simply stated, the radioactive content of the material has not been quantified and the applicant's request for an export license "to allow Italian waste that cannot be disposed in Utah to be exported back to Italy"⁵ is inadequate to demonstrate that the proposed import would not constitute "an unreasonable risk to the public health and safety." *See* 10 C.F.R. § 110.43(b). Further, if the NRC were to condition license issuance on Italy's acceptance of returned waste, as a practical matter, it would be unenforceable and may result in orphaned waste. Moreover, whether risk is "unreasonable" must be evaluated in light of all the circumstances. *See* discussion part C, *infra*.

Second, whether granting an import and export license for foreign-generated radioactive waste presents "special circumstances" such that the 10 C.F.R. Part 110 categorical exclusion to NEPA does not apply. 10 C.F.R. § 51.22(b) and (c)(1). If it does not apply, NRC must conduct an environmental assessment or environmental impact statement. *Id.* § 51.25. Not only are "special circumstances" present but also EnergySolutions' sworn testimony to Congress leaves no doubt that this application is the first of many future requests to dispose of foreign-generated waste in the

⁴*See* signature block, below, for details to satisfy 10 C.F.R. § 110.82(b)(1).

⁵*See supra* n.2 and accompanying text.

United States.⁶ Accordingly, this is one of many connected actions that cannot be segmented and NRC cannot comply with NEPA through a categorical exclusion.

Third, whether an appropriate facility has agreed to accept the foreign waste (whether or not it has been processed in the U.S.) for management or disposal. EnergySolutions says the purpose of its application is to import contaminated material for disposal at its Clive facility.⁷ Significantly, the Northwest Interstate Compact has put NRC on notice “that should it [NRC] choose to issue the import license (IW023) it is doing so with the understanding there is no facility within the Northwest Compact region that is authorized to legally accept this waste for disposal.”⁸ Utah supports the Northwest Interstate Compact’s position. Further, were NRC to issue an import license to EnergySolutions, contrary to the Compact’s explicit exercise of its exclusionary authority,⁹ it would do so at the risk of jeopardizing not only the viability of the Hanford site, but also the entire compact system.¹⁰

⁶Mr Creamer testified that his company would place a self-imposed limit on the disposal of international waste to five percent of remaining capacity at Clive. Testimony of R. Steve Creamer, Chairman and Chief Executive Officer, EnergySolutions, Energy and Air Quality Subcommittee, House Energy and Commerce Committee, May 20, 2008 at 5. (*See Mr. Creamer’s testimony at* http://energycommerce.house.gov/cmte_mtgs/110-eaq-hrg.052008.RadioactiveWaste.shtml).

⁷See *supra* nn. 2 and 3 and accompanying text.

⁸Northwest Compact Letter to NRC, *supra* n. 1, at 1.

⁹See Northwest Interstate Compact on Low-Level Radioactive Waste Management, 42 U.S.C. § 2021d note, Article II (definition of “facility”), Article IV(2) (“No facility located in any party state may accept low-level waste generated outside of the region comprised of the party states, except as provide in Article V.”) and Article V (“Notwithstanding any provision of article IV to the contrary, the committee may enter into arrangements with states [etc.] . . . for access to facilities on such terms and condition as the committee may deem appropriate.”).

¹⁰See *e.g.*, GAO Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate, *Low-Level Radioactive Wastes: States Are Not Developing Disposal Facilities*, GAO/RCED-99-238, Sept. 1999 at 56 (“after collectively spending about \$600 million, not one of the compacts has successfully developed a new disposal facility for low-level radioactive wastes. This history, coupled

Finally, the relief sought by the State is for the Commission to deny EnergySolutions' license application for the import/export of Italian waste.

B. Public Interest and Assistance to the Commission

EnergySolutions' import/export license application has generated significant public interest. NRC has testified before Congress on the issue;¹¹ NRC has received over 2,000 public comments on the application;¹² NRC has created a special fact sheet about the application on its web site;¹³ and Congress has reacted by introducing legislation (H.B. 5632) to ban the import of certain low level radioactive wastes.

The high public interest in this issue is one reason the Commission should allow the State of Utah to intervene. As the regulator of EnergySolutions' Clive facility, as a member of the Northwest Interstate Compact, and as a participant in past NRC proceedings, the State brings a unique perspective that will assist the Commission in evaluating the 10 C.F.R. Part 110 criteria for issuing an import/export license for foreign-generated low level radioactive waste. Moreover, the State is representing the interests of its citizens, who will bear the brunt of any disposal of foreign waste NRC permits to enter the United States and be disposed of in Utah.

with the declining volume of wastes, raises questions about whether compacts could economically provide new disposal facilities in the absence of some merging and/or realignment of compacts.) (available at: <http://www.gao.gov/archive/1999/rc99238.pdf>).

¹¹Testimony of Margaret M. Doane, Director Office of International Programs, NRC, to the Committee on Energy and Commerce Subcommittee on Energy and Air Quality United States House of Representatives Regarding H.R. 5632, a Bill to Prohibit the Importation of Certain Low-level Radioactive Waste into the United States, May 20, 2008 (ADAMS Accession No. ML081420048).

¹²Id. at 8.

¹³<http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/energysolutions.html>.

C. Utah's Interest and How it May be Affected

Utah has an interest in whether NRC grants an import/export license to EnergySolutions. First, the disposal facility is located in the State. Second, the State of Utah regulates the disposal facility. Third, the State is a member of the Northwest Interstate Compact. Finally, the State under the doctrine of *parens patriae*, has a quasi-sovereign right to protect the interests of its citizens.¹⁴

The import of foreign waste into the United States for disposal in Utah presents a conflict with the use of an available resource. 10 C.F.R. § 51.22(b). There is limited disposal capacity in the United States for domestically generated Class A waste. Also, import of foreign waste requires a different analysis of whether the waste presents an unreasonable risk to public health and safety. *See* 10 C.F.R. § 110.43(b). Some level of risk is inherent in any proposal to transport and dispose of radioactive waste. Citizens of Utah and of the United States may be willing to accept as reasonable the risk of transportation and disposal of radioactive waste for the societal benefits that flow from processes that created those wastes. The same assessment of reasonable risk, however, does not apply to foreign-generated waste because of the absence of those societal benefits to citizens of the United States. Moreover, in balancing risk, the State of Utah and the Compact only considered domestically generated waste when approving land disposal of Class A radioactive waste at Clive. The Clive site is the only site where most states may dispose of Class A waste. It is scarce resource that should not be squandered on foreign-generated waste.

¹⁴Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 258 (1972) (State may act to prevent or repair harm to its quasi-sovereign interests); Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 600-607 (1982) (State has a quasi-sovereign interest in the physical and economic health and well-being of its residents).

Utah's economy generates significant revenue from business expansion, relocation and headquarter decisions, as well as from tourism. Utah already struggles with the perception, by some, that it may be the "dumping" ground for the nation's radioactive waste. If NRC permits import of waste streams from Italy and other global locales for disposal at Clive, Utah's economy will likely suffer economic harm.

Utah's interests in the EnergySolution import/export license application will be satisfied if the Commission denies the license request. There are grounds for denial and it is within the Commission's power to do so. Accordingly, such an order from the Commission will redress Utah's alleged injury. 10 C.F.R. § 110.84(b).

III. Conclusion

The State of Utah requests the Commission grant its request for a hearing and petition for leave to intervene.

DATED this 10th day of June, 2008.

Respectfully submitted,

/signed electronically by Denise Chancellor/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REQUEST FOR A HEARING AND PETITION FOR LEAVE TO INTERVENE was served on the persons listed below via the NRC Electronic Information Exchange E-Filing System (EIE) or via electronic mail, as indicated, this 10th day of June, 2008:

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